No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALLIANCE FOR COMMUNITY MEDIA,
ALLIANCE FOR COMMUNICATIONS DEMOCRACY,
PEOPLE FOR THE AMERICAN WAY,
NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA,
MEDIA ACCESS NEW YORK,
BROOKLYN PRODUCERS' GROUP, AND
DAVID CHANNON,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

[Names Of Counsel Appear On Inside Front Cover]

August 9, 1995

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QUESTIONS PRESENTED

1. Whether a congressionally enacted law can evade scrutiny under the First Amendment for lack of state action when that law -- Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 -- on its face disfavors certain constitutionally protected speech on cable access channels based solely on its content.

2. Whether Section 10 implicates state action and therefore invokes First Amendment scrutiny because (a) the statute and its implementing regulations preempt state and local law and cable franchise agreements, (b) the government has significantly encouraged a ban on indecent programming, and (c) the media Section 10 regulates -- cable access channels -- have been dedicated by governmental authorities for the public to use for expressive discourse and are therefore a public forum.

3. Whether Section 10's content-based requirement that cable operators segregate-and-block "indecent" access programming on cable television may be considered the least restrictive means to further a compelling interest where Congress never evaluated the effectiveness of existing, less restrictive means of furthering that interest.

> [The following question is presented in the Petition for Writ of Certiorari in *DAETC, et al.* v. *FCC, et al.*, No. 95-124. Petitioners hereby adopt it by reference.]

4. "Is Section 10 unconstitutionally vague under the heightened scrutiny required in First Amendment cases, where it (a) defines "indecent programming" based upon its "patently offensive manner as measured by contemporary community standards," (b) authorizes cable operators to ban leased access programming that they "reasonably believe" to be indecent, and (c) will produce self-censorship by access programmers by requiring them -- on pain of fines or cut-off of access -- to guess what the FCC may decide is, and what a cable operator may "reasonably believe" to be, "indecent," and to certify that their programs do not violate these standards?"

LIST OF PARTIES

The judgment here sought to be reviewed was rendered in a proceeding in which four petitions for review of orders of the FCC were consolidated: D.C. Cir. Nos. 93-1169, 93-1171, 93-1270, and 93-1276. Petitioners Alliance for Community Media, Alliance for Communications Democracy, and People for the American Way were petitioners in Nos. 93-1169 and 93-1270. Petitioners New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group, and David Channon were intervenors in all four actions. None of these Petitioners has parent companies or subsidiaries.

In addition to those listed on the cover, respondents include Denver Area Educational Telecommunications Consortium, Inc., which was a petitioner in No. 93-1171, the American Civil Liberties Union, which was a petitioner in Nos. 93-1171 and 93-1276, and the National Cable Television Association, Inc., which was an intervenor in all four actions. The first two of these parties have filed a separate petition for writ of certiorari, which has been docketed as No. 95-124.

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OPINIONS BELOW

The opinion of the court of appeals *in banc* ("the *in banc* court") is reported at 56 F.3d 105 (D.C. Cir. 1995) and is reprinted in the appendix of Petition No. 95-124 at App. 2a.[1] The opinion of the panel is reported at 10 F.3d 812 (D.C. Cir.

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[1]All citations herein to "App. __a" refer to the appendix in Petition No. 95-124, *DAETC, et al.* v. *FCC, et al.*

1993) and reprinted at App. 90a. The First Report and Order and Second Report and Order of the Federal Communications Commission ("the FCC"), are reported at 8 FCC Rcd 998 (1993) and 8 FCC Rcd 2638 (1993), and reprinted at App. 128a and 178a, respectively.

JURISDICTION

The *in banc* court issued its decision on June 6, 1995.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act"), Pub. L. No. 102-385, 106 Stat. 1460, 1486 (1992), is reprinted at App. 126a. Subsections 10(a), (b), and (d) amended §§ 612 and 638 of the Communications Act of 1934 ("the 1934 Act"), 47 U.S.C. §§ 532 & 558 (1988 & Supp. V 1993). Subsection 10(c) appears in a note following 47 U.S.C. § 531.

These and other relevant provisions of the 1934 Act are reprinted in the Statutory Appendix to this petition ("Stat. App.") as they appear in the current version of the U.S. Code.

The FCC promulgated regulations to implement Section 10 of the 1992 Act that are codified at 47 C.F.R. §§ 76.701 and 76.702 and that are reprinted at App. 170a and 197a, respectively.

STATEMENT

1. **Introduction.** This case concerns Congress's attempt to regulate the content of what appears on cable television public access and leased access channels, and to evade constitutional scrutiny, under the state action doctrine, while doing so.

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[2]On July 10, 1995, the *in banc* court granted Petitioners' motion to stay the mandate pending the filing of this Petition for a Writ of Certiorari. App. 1a.

For three decades access channels have been dedicated for the use of persons or entities who otherwise would have no means to communicate via cable television, a medium that "today stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources." *Turner Broadcasting System* v. *FCC*, 114 S. Ct. 2445, 2451 (1994). PEG (public, educational, and governmental) or public access channels, in particular, were "established by the government for the expressive activities of the public." Daniel L. Brenner, *et al.*, *Cable Television and Other Nonbroadcast Video* § 6.04[5], at 6-45 (1995) [hereinafter Brenner, *Cable Television*]. They serve this purpose well. Available as part of a subscriber's basic cable service, access channels permit the production of local programming by providing training and production facilities for community residents and institutions wishing to create programs. In this regard, they serve as a "site for communication among and between members of the public as the public, about issues of public importance." Aufderheide, *Cable Television and the Public Interest*, 42 Journal of Communication 52, 58 (1992).

Congress has now enacted a content-based law relating to programming on access channels. As a result, Congress has significantly encouraged cable operators to censor a type of access programming Congress disfavors -- which contains so-called "indecent" material, as that term has been broadly defined by Congress -- even though Congress has forbidden censorship of any other type of constitutionally protected programming on access channels. The United States and the *in banc* court both acknowledged in this case that because the indecent programming Congress has singled out is fully protected under the First Amendment, if state action is present in this scheme, Congress's content-based distinctions raise grave constitutional problems.

This case, then, as the government well understands, is not about obscenity or pornography. Petitioners include numerous nationwide and local organizations representing public access producers, programmers, editors, access center managers and

staff members, and local cable governmental officials in hundreds of communities across the nation, as well as thousands of viewers of cable television. Petitioners have no interest in transmitting obscenity or pornography via the cable medium, nor do they have any desire to see "how close to the line" they can come. Instead, Petitioners seek review because Congress, in its attempt to regulate what it has broadly defined as indecency, has enacted legislation that will result in the censorship of programming of substantial literary, artistic, scientific, and political merit that currently appears on access channels. See App. 45a (Wald, J., dissenting).[3]

2. **The Origins of Access.** Cable access channels date back to the 1960s. In order to provide the public with "a direct right of access to the video media," local governmental authorities began requiring that cable operators -- the companies that sell cable service to subscribers -- provide public access channels as a condition to franchise approval. Brenner, *Cable Television*, *supra*, § 6.04[1], at 6-31. Local governments, in turn, provided the cable operators "use of public rights-of-way and easements" essential to the cable system's "physical infrastructure." *Turner*, 114 S. Ct. at 2452.

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[3]The administrative record below is replete with examples of access programming that provides valuable information to viewers, but that could be swept up in the government's broad definition of indecency, including programs that focus on health and sex education, art censorship, and feminism. See, *e.g.*, Joint Appendix in Nos. 93-1169 (and consolidated cases) (D.C. Cir. refiled July 11, 1994) (*in banc*) at 124-31 ("J.A."). On the other hand, Section 10 was hastily conceived and enacted, without any legislative hearings, and after only a brief discussion about lewd access programming on the Senate floor that was based entirely on anecdotal hearsay as recounted through a handful of letters from constituents. Indeed, the administrative record below indicates that Congress's concern about highly objectionable public access programming is misplaced. The anecdotes related on the Senate floor of objectionable programming that supposedly appeared on *public* access, see 138 Cong. Rec. S649-50 (daily ed. Jan. 30, 1992) (statements of Senators Fowler and Wirth), actually appeared on *leased* access channels. See Manhattan Neighborhood Network Comments in MM Docket No. 92-258 (filed Dec. 4, 1992) at 4-5.

In the following years, the FCC made access channels mandatory for all cable systems, but in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), this Court ruled that the FCC lacked the statutory power to do so under the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.* ("the 1934 Act"). Local franchising authorities, such as municipal and county governments, suffered no such disability, however. Thus, in the years after *Midwest Video*, "almost all . . . franchise agreements" between cable operators and franchising authorities continued to "provide for access by . . . community groups over" public access channels. H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984).

3. **The 1984 Cable Act.** What the FCC could not accomplish on its own, however, Congress did in 1984. Thus, to further Congress's goal of providing "the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4), the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (1984) ("the 1984 Act"), added provisions to the 1934 Act that (i) ratified local governments' preexisting authority to require cable operators to provide channels for public access (as well as educational and governmental access) as a condition for franchise approval, 47 U.S.C. § 531(b), Stat. App. 1a, and (ii) required cable operators to provide "leased access" channels for commercial use by entities unaffiliated with the cable operator, *id.* § 532(b)(1), Stat. App. 2a-3a.

In the 1984 Act, Congress also recognized cable operators' hostility toward access programming. Congress understood that access channels (i) may "represent[] a social or political viewpoint that a cable operator does not wish to disseminate," H.R. Rep. No. 934, *supra*, at 48, (ii) may "compete[] with a program service already being provided by that cable system," *id.*, and (iii) may use up channel capacity the operator could otherwise use for its own programming. In fact, as this Court recently recognized, "a cable operator, unlike speakers in other media, can . . . silence the voice of competing speakers with a mere flick of the switch," creating "[t]he potential for abuse of

this private power over a central avenue of communication," *Turner*, 114 S. Ct. at 2466.

Accordingly, to ensure access channels would continue to truly be available for use by the public, the 1984 Act reaffirmed what has been a long-standing practice at the local level: namely, it prohibited operators from "exercis[ing] *any* editorial control over *any*" constitutionally protected expression appearing on access channels. 47 U.S.C. §§ 531(e), 532(c)(2), Stat. App. 1a, 4a. (emphasis added). Concomitantly, cable operators were granted a statutory immunity from *all* possible liability arising from the content of access programming, leaving the liability with the program's creators. See 98 Stat. 2801 (1984) (prior version of 47 U.S.C. § 558).

The 1984 Act also evinced Congress's concern that children be protected from cable programming -- whether on an access channel or any other cable channel -- that their parents found unsuitable. Congress therefore enacted a "lockbox" provision, which requires cable operators to make available to their subscribers an electronic device that "prohibit[s] viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. § 544(d)(2), Stat. App. 5a. A lockbox permits an adult subscriber to tailor precisely what programming that subscriber's household may view. As explained more fully below, see *infra* pp. 26-27, Congress and the FCC have recognized that the lockbox provision provides an easy and effective method to protect children from material their parents deem inappropriate.

4. **Section 10 of the 1992 Cable Act.** The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("the 1992 Act"), is a lengthy enactment that was designed, after months of debate, study, and drafting, primarily to reregulate cable service.

The provisions being challenged here, however, were a legislative afterthought. Neither of the bills that originated the 1992 Act contained any provision that even remotely resembles what is now Section 10, nor did any congressional hearing or report discuss the provision. Rather, on the last legislative day

before the Senate approved the bill that became the 1992 Act, three separate floor amendments were added that were collectively codified as Section 10.

The abbreviated legislative discussion on the Senate floor was narrowly focused. Absolutely no mention was made of lockboxes. Instead, the entire debate revolved around two recurring themes: first, that Congress disliked a certain type of programming -- so-called "indecent" programming as Congress defined it -- and second, that Congress's disfavor of this type of programming should evade constitutional scrutiny.[4]

Section 10 thus amends the 1984 Act's content-neutral treatment of programming on access channels to create a new content-based censorship scheme. This new scheme prevents the cable operator from suppressing any speech *except* that disfavored by the government, while simultaneously encouraging the cable operator to censor the disfavored type of speech -- namely, a broadly defined category of "indecent" programming. Congress put this power to censor the disfavored speech in the hands of those known to be the most hostile to access channels -- cable operators. The scheme, moreover, applies exclusively to programming on access channels, leaving the programming appearing on all other cable television channels free from the same content-based distinctions.

For both public access and leased access, Section 10(d) abrogates cable operators' statutory immunity from liability for the content of access programming supplied by the 1984 Act. Instead, a cable operator now may be held civilly and criminally liable if it carries any access programming that "involves obscene material." See 47 U.S.C. § 558, Stat. App. 6a. Section 10(d) thus imposes potential liability on the cable operator for

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[4] See, *e.g.*, 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (Senator Helms: "Under my amendment, cable operators have the right to reject such filthy programming."); *id.* (Senator Helms: "[T]here is no constitutional problem with this amendment because this is not governmental action. It is an action taken by a private party."); *id.* at S649 (Senator Fowler: "[indecent and other undesired programming] should be stopped, must be stopped, and I think this amendment will empower the cable operators to stop it.").

someone else's speech -- *i.e.*, that of members of the public or other entities unaffiliated with the cable operator.

Not coincidentally, the remainder of Section 10 provides the cable operators with the means to avoid liability for the speech of these third parties. For public access, Section 10(c) requires the FCC to promulgate regulations to carve out a single exception to the existing prohibition on censorship of constitutionally protected expression that would enable a cable operator to prohibit programming containing "sexually explicit conduct" or "material soliciting or promoting unlawful conduct," while maintaining the existing prohibition of censorship of any other PEG programming. See 47 U.S.C. § 531 note, Stat. App. 2a.

Similarly, Section 10(a) allows cable operators to prohibit leased access programming that the operator "reasonably believes describes or depicts" indecency -- that is, "sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards" -- while maintaining the existing prohibition of censorship of other leased access programming. See 47 U.S.C. § 532(h), Stat. App. 4a. If the cable operator does not suppress such leased access programming pursuant to Section 10(a), Section 10(b) mandates that the cable operator place the congressionally disfavored programming on a single, blocked channel which the subscriber cannot receive unless the subscriber requests access in writing. See 46 U.S.C. § 532(j), Stat. App. 4a-5a.

5. **The FCC's Rulemaking and Implementing Regulations.** After commencing an informal rulemaking in which Petitioners participated, the FCC issued two Reports and Orders that promulgated regulations implementing Section 10 and that also contained extensive interpretive discussions of both the statute and implementing regulations.

In accordance with Congress's command, the FCC regulations authorize cable operators to ban indecent programming on public access channels. 47 C.F.R. §§ 76.701(a), 76.702, App. 171a, 197a. The regulations also require all access programmers to self-identify any programming

that potentially falls into the disfavored "indecency" category. 47 C.F.R. §§ 76.701(d), 76.701(e), 76.702, App. 171a-172a, 197a-198a. Unless the access programmer can certify that the programming is not indecent, the cable operator may then refuse to carry the programming in question. 47 C.F.R. §§ 76.701(f), 76.702, App. 172a, 197a-198a. The FCC justified these regulations "in view of the removal of cable operators' immunity" under Section 10(d). Second Order, ¶ 25, App. 192a; First Order, ¶ 50, App. 155a. In the event of a dispute between a programmer and a cable operator over whether a particular program is "indecent," the FCC has agreed to arbitrate. See First Order, ¶¶ 73-75, App. 166a-168a.

The FCC also concluded that "state laws regarding indecency . . . *are pre-empted* by the Cable Act's explicit provisions governing indecent programming," First Order ¶ 51 n.44, App. 157a (emphasis added), and that "Congress intended the new rights accorded by section 10(c) to *supersede prior agreements*" regarding PEG access. Second Order ¶ 10 n.7, App. 184a (emphasis added). Section 10 thus prevents all the states, as well as local cable authorities, from preserving the editorial independence of local public access programmers.

6. **The Panel Decision Below**. Following petitions for review filed pursuant to 47 U.S.C. § 402(a), 28 U.S.C. § 2342(1), and 28 U.S.C. § 2344, counsel for the government conceded at oral argument before a panel of the court of appeals that Sections 10(a) and 10(c) were unconstitutional if state action was present. See App. 104a n.9, 110a n.15, 111a n.16. The panel found state action and accordingly declared Sections 10(a) and 10(c) unconstitutional.

Invoking the "significant encouragement" test of *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982), the panel found that Sections 10(a) and 10(c) and their implementing regulations involved state action because they "evince[] an effort on the part of the government to enlist the cable operator in the suppression of indecent material. The government focuses the cable operator's attention on the only material the government seeks to suppress, and then permits the cable operator expressly to suppress that -- and no other -- material." App. 104a-05a.

The panel then assessed the constitutionality of Sections 10(a) and 10(c). The panel observed first that this Court has found that "indecent" speech is protected by the First Amendment. See *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). This, the panel continued, is to be contrasted with obscene speech (or so-called "'hard core' pornography"), which does not deserve constitutional protection because it, *inter alia*, appeals only to prurient interests and lacks any serious literary, artistic, political, or scientific value. As a result of this distinction, the panel noted, the FCC's definition of indecency could include within its sweep "a truly scientific program . . . that discusses the prevention of life-threatening diseases through the use of condoms." App. 98a, n.3. The panel then concluded that, consistent with the government's concession, Sections 10(a) and 10(c) failed to "present[] the least restrictive means of furthering the asserted interest" of limiting the access of children to indecent material, App. 109a, and thus were unconstitutional, App. 111a.

Finally, the panel held that the block-and-segregate provisions of Section 10(b) singled out programmers on leased access channels for content-based regulation while leaving programmers of other channels -- such as a cable operator's own channels -- unregulated. App. 112a-125a. The panel remanded this issue to the FCC "to justify or to cure" this potential constitutional infirmity. App. 121a.

7. **The *In Banc* Decision Below.** On rehearing, the *in banc* court acknowledged that "[i]f decisions . . . not to carry indecent programs on . . . access channels . . . were treated as decisions of the government, the [FCC] and the United States would be hard put to defend the constitutionality of these provisions." App. 11a. The *in banc* court held, however, that because the censorship contemplated by Congress was by its terms "permissive" -- that is, cable operators may, but are not required to, censor "indecent" programming on access channels -- no state action was involved in this scheme.

In addressing state action, the *in banc* court was unpersuaded that state action was present even though "Congress enacted section 10(a) and section 10(c)," which on their face single out

particular speech for unfavorable treatment based on its content, and "a federal agency issued regulations putting the provisions into effect," App. 12a. The *in banc* court also rested its state action analysis on a fundamental misapprehension of the nature of access channels -- namely, the court incorrectly assumed that prior to the 1984 Act, cable operators exercised editorial control over programming on these channels. App. 14a-15a; see *supra* p. 6.

The *in banc* court also completely ignored Petitioners' argument, based on well-established precedent in this Court, that a statute that preempts contrary state and local law necessarily implicates state action regardless of its "permissive" nature. See *infra* pp. 17-19.

In addition, disregarding Petitioners' reliance on *Skinner* v. *RLEA*, 489 U.S. 602 (1989), see *infra* pp. 19-23, the *in banc* court held that no significant encouragement was present to implicate state action. App. 23a-27a. The *in banc* court reached this conclusion despite Petitioners' contention that Section 10(d)'s imposition of liability and administrative burdens on cable operators for the speech of others means that cable operators will use their censorship powers broadly.

The *in banc* court also considered Petitioners' argument that, as Congress, commentators, and the FCC have recognized, access channels constitute a public forum. See *infra* pp. 23-25. Notwithstanding this Court's recognition in *Turner* that the cable "infrastructure entails the use of public rights-of-way and easements," 114 S. Ct. at 2452, the *in banc* court focused solely on ownership of the equipment by which programming is transmitted into homes and held that access channels "belong to private cable operators" and therefore could *never* be a public forum. App. 29a.

Finally, the *in banc* court considered whether Section 10(b)'s mandatory blocking of "indecency" on leased access, as a content-based restriction on speech, was the least restrictive means of furthering a compelling state interest, which it characterized as protecting children from indecency. See *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989); *infra*

pp. 25-27. The *in banc* court acknowledged (i) that existing law already mandates that cable operators make lockboxes available to subscribers, (ii) that lockboxes enable parents "to block indecent programming they do not want their children to see," and (iii) that lockboxes "are effective means of restricting access to indecent programming." App. 38a n.22. Nonetheless, and notwithstanding uncontradicted record evidence that lockboxes provide less restrictive means than Section 10(b) to further the government's articulated interest, the *in banc* court upheld the constitutionality of Section 10(b). App. 36a.

Four judges dissented from all or part of the majority opinion. In the principal dissenting opinion, Judge Wald concluded that Sections 10(a), (b), and (c) involved state action and were unconstitutional. Judge Wald recognized that "cable operators and programmers are subject to two fundamentally different statutorily-assigned schemes of substantive and procedural rights, duties, and burdens with respect to [access] programming. Which of those schemes applies depends solely on whether the content of the programming meets the government's definition of 'indecent.'" App. 71a-72a. This differential treatment demonstrates that "the government disfavors 'indecent' speech, and seeks through this differential regulation to limit speech in that disfavored category." App. 72a-73a. Citing to this Court's decision in *Turner*, Judge Wald concluded that Section 10 consists of "a congressionally-enacted statute that both facially discriminates on the basis of the content of speech, and has a 'manifest purpose' to 'burden . . . speech of a particular content.'" App. 73a.

REASONS FOR GRANTING THE WRIT

We show in detail below that the *in banc* court reached its decision only by totally disregarding important decisions of this Court on state action and on the First Amendment, and that the *in banc* court's decision is in conflict with decisions of other federal appellate and state supreme courts. Even aside from the *in banc* court's refusal to acknowledge controlling precedent, this case is well worth the Court's attention, because it raises fundamental issues about whether Congress may enact content-based statutes that evade constitutional review, as well

as the role of the First Amendment in regulating cable and other existing and emerging modes of expression and communication.

I. THE PETITION INVOLVES ISSUES OF EXCEPTIONAL IMPORTANCE RELATING TO CONGRESS'S ABILITY TO REGULATE THE CONTENT OF INFORMATION TRANSMITTED ON EXISTING AND EMERGING COMMUNICATIONS MEDIA.

Certiorari is particularly appropriate in this case to address a pressing state action issue that is likely to recur as Congress tries to regulate other information technologies and media. Congress sought to draft Section 10 in a manner that would prevent the courts from addressing its constitutionality. See *e.g.*, 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (Senator Helms: "[T]here is no constitutional problem with this amendment because this is not governmental action. It is an action taken by a private party."). The government and the *in banc* court both acknowledged that if state action is present, Sections 10(a) and 10(c) present First Amendment problems of the gravest sort. Thus, if the state action doctrine prevents the courts from evaluating whether all of Section 10 passes constitutional muster, Congress will inevitably be tempted to use Section 10 as a blueprint to evade constitutional scrutiny for similar content-based censorship schemes, by singling out particular types of disfavored speech for censorship and then leaving it up to private parties to make the actual decision to censor. The Court should therefore grant certiorari to address whether the state action doctrine allows Congress to abridge speech in this manner.

Moreover, this case does not involve a dispute between private parties, but rather challenges a federal statute and its nationwide implementing regulations. The statute and regulations are aimed directly at the content of programming on cable television, a medium "at the center of an ongoing telecommunications revolution." *Turner*, 114 S. Ct. at 2451. The statute and regulations at issue preempt all state and local laws and franchise agreements on whether access programmers can continue to speak on access channels free from interference

from cable operators as they were able to do long before the 1984 Act, and therefore affects every cable television viewer, cable system, and access programmer in the United States. These overarching factors make it imperative that the Court grant certiorari to ensure that the decision ultimately reached -- which literally affects thousands of public access programmers and millions of viewers -- is correct.

II. THE DECISION BELOW OVERLOOKS THE STATE ACTION INHERENT IN CONGRESS'S CREATION OF CONTENT-BASED REGULATION OF CABLE PROGRAMMING AND THEREFORE CONFLICTS WITH THIS COURT'S RECENT DECISION IN *TURNER BROADCASTING SYSTEM* v. *FCC* REQUIRING THAT SUCH REGULATION BE SUBJECTED TO STRICT SCRUTINY UNDER THE FIRST AMENDMENT.

To understand why the *in banc* decision's state action analysis was not only incorrect but completely unprecedented, it is worth returning to the first five words of the First Amendment: "*Congress shall make no law*" abridging freedom of speech. (Emphasis added.) Here, Congress and the FCC have enacted into law a scheme that favors some types of cable programming (non-indecent), but explicitly disfavors other types of programming (indecent), based upon the content of that programming. Little over a year ago, this Court affirmed that the First Amendment applies in full to the cable medium and requires "the most exacting scrutiny to regulations that suppress, *disadvantage, or impose differential burdens* upon speech because of its content." *Turner*, 114 S. Ct. at 2458-59 (emphasis added). Thus, *Turner* demands that Sections 10(a) and 10(c) -- which clearly disadvantage speech based on its content -- conform to the First Amendment, just as it would if Congress had forbidden censorship of programming concerning the "Whitewater" investigation, but had authorized censorship of programming concerning scandals that involved members of Congress.

The *in banc* court did not apply *Turner* to Sections 10(a) and 10(c), because the majority found no state action to be present. As Petitioners argued to the *in banc* court and as the dissent

recognized, however, the state action necessary to invoke the First Amendment is inherent in the creation of the content-based laws and regulations that are the subject of this litigation. See App. 46a-53a, 71a-74a (Wald, J., dissenting). Petitioners have challenged a statute enacted by Congress, and regulations promulgated by the FCC, that "by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed" in that speech. *Turner*, 114 S. Ct. at 2459. Thus, as a result of the 1992 Act's amendment of the 1984 Act, in any cable system that has access channels, cable operators are *compelled* to carry programming on these channels that is not "indecent," as that term is defined in the statute and regulations. If, however, the programming is deemed "indecent," the programming loses the automatic right to appear on access channels that it would otherwise enjoy. See 47 U.S.C. §§ 531 note, 532(h), Stat. App. 2a, 4a. Under *Turner*, this regulatory scheme creates a content-based hierarchy between favored speech, which cable operators must carry without editing, and disfavored speech, which cable operators need not carry at all. See App. 71a ("Quite plainly, the revised statutory scheme is on its face a content-based regulation of speech.") (Wald, J., dissenting).

State actors, not private actors, are responsible for the creation of the content-based scheme for determining what can and cannot be censored on access channels. And because it is the creation of this scheme itself that Petitioners contend is unconstitutional, the state action in this case is as plain as it is in any situation in which the government tries to regulate speech based on its content. See 2 R. Rotunda & J. Nowak, *Treatise on Constitutional Law* § 16.1, at p. 524 (2d ed. 1992) ("The so called 'state action' issue arises only when the person or entity alleged to have violated the Constitution is not acting on behalf of the government.").

Instead of focusing on Petitioners' contention that Congress's enactment of the content-based scheme supplied the necessary state action, the *in banc* court recast the critical issue as whether cable operators would be state actors if they decided to censor indecent programming on access channels. By

reframing the issue in this manner, however, the *in banc* court's state action analysis strayed wide of the mark. See *Blum* v. *Yaretsky*, 457 U.S. 991, 1003 (1982) ("Faithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint."). Regardless of who is doing the actual censoring, and whether or not the act of censorship is compelled, encouraged, or merely authorized, Congress's decision to authorize censorship of indecent programming and to forbid censorship of non-"indecent" programming is all that is needed to invoke First Amendment scrutiny.

Until the *in banc* decision, no modern decision of any federal appellate court has erected a state action barrier to allow a government-enacted, content-based scheme for regulating speech to escape all scrutiny under the First Amendment. Moreover, as Judge Wald also recognized, this Court's state action decisions do not support the *in banc* majority. As this Court explained in *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982), the state action doctrine is designed to "preserve[] an area of individual freedom by limiting the reach of federal law and federal judicial power" and to "avoid[] imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." Petitioners do not seek to impose the reach of federal law where it does not already go or to blame the United States for the independent activities of a private party. Instead, Petitioners are challenging the government's right to disfavor constitutionally protected speech based on its content. See App. 74a ("[U]nder these circumstances it would be . . . contrary to the principles underlying the state action doctrine to allow the government to evade constitutional responsibility for its own conduct, simply because it has set up a private party as the triggerman in its carefully crafted scheme.") (Wald, J., dissenting).

In short, when Congress makes a law that regulates cable programming based on its content, *Turner* requires scrutiny under the First Amendment. The only state action necessary to invoke this scrutiny should be the creation of the content-based law itself. This Court should therefore grant certiorari to

resolve the conflict between the *in banc* court's unprecedented refusal to apply the First Amendment to a federal law regulating speech based on its content, and this Court's decision in *Turner*.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER COURTS OF APPEALS WHICH HOLD THAT STATE ACTION IS PRESENT WHEN A FEDERAL STATUTE PREEMPTS CONTRARY STATE AND LOCAL LAWS ON THE SAME SUBJECT.

The central premise of the *in banc* court's state action holding is that Section 10's scheme for censoring access programming is permissive: "Rather than coerce cable operators, section 10 gives them a choice." App. 18a. Since this Court's decision in *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), however, it has been well-settled that where a federal statute preempts contrary state and local laws, state action attaches, regardless of the statute's otherwise permissive nature. The *in banc* court's decision, in ignoring the preemptive effect of the 1992 Act and the FCC's regulations and in holding that Sections 10(a) and 10(c) do not implicate state action, squarely conflicts not just with *Hanson*, but also with decisions from this Court re-affirming that state action was present in *Hanson* because of preemption, and with decisions from the Second and Tenth Circuits emphasizing this very point.

In *Hanson*, this Court assessed the constitutionality of the Railway Labor Act's ("RLA") union shop provision, which -- like the 1992 Act at issue here -- was "permissive" in the sense that "Congress ha[d] not compelled nor required carriers and employees to enter into union shop agreements," 351 U.S. at 231. This Court ruled that, despite its permissive nature, the provision implicated state action because, "[i]f private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." *Id.* at 232. State action followed from the RLA's preemptive effect, the *Hanson* Court reasoned, because any privately-negotiated union shop agreement carried "the

imprimatur of the federal law upon it" since it "could not be made illegal nor vitiated by any provision of the laws of a State." *Id.*

This principle -- that state action follows from preemption because the federal statute creates a right or privilege that permits private parties to override contrary state or local law -- has been re-affirmed on at least three occasions by this Court. *Communications Workers of America* v. *Beck*, 487 U.S. 735, 761 (1988) ("[W]e ruled in [*Hanson*] that because the RLA pre-empts all state laws banning union-security agreements, the negotiation and enforcement of such provisions in railroad industry contracts involves 'governmental action.'"); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 218 n.12 (1977) (the RLA "pre-empts any attempt by a State to prohibit a union-shop agreement. Had it not been for that federal statute, the union-shop provision at issue in *Hanson* would have been invalidated under Nebraska law. The *Hanson* Court accordingly reasoned that government action was present . . . ."); see also *Skinner* v. *RLEA*, 489 U.S. 602, 615 (1989) (regulations pertaining to non-mandatory drug-testing, which, *inter alia*, "pre-empt state laws, rules or regulations covering the same subject matter . . . and are intended to supersede 'any provision of a collective bargaining agreement,'" constitute state action).

Further, the Second and Tenth Circuits have explicitly "held that the finding of state action under Section 2, Eleventh of the RLA [in *Hanson*] rests squarely on the fact that the RLA expressly preempts contrary state law." *Price* v. *International Union, UAW*, 927 F.2d 88, 92 (2d Cir. 1991); *Reid* v. *McDonnell Douglas Corp.*, 443 F.2d 408, 410 (10th Cir. 1971).

The preemptive effect of the 1992 Act's regulatory scheme was specifically cited to the *in banc* court. Petitioners noted that the FCC had explicitly concluded that "state laws regarding indecency . . . are preempted," see *supra* at p. 9, and that this would have the intended effect of displacing all contrary state and local laws. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984) ("[I]f the FCC has resolved to pre-empt an area of cable television regulation and if this determination

'represents a reasonable accommodation of conflicting policies' that are within the agency's domain, we must conclude that all conflicting state regulations have been precluded.") (citation omitted). Petitioners contended further that the decision by a private cable operator to prohibit indecent cable speech will thus carry the imprimatur of federal law because it cannot be overridden by a contrary state or local law or by a previously negotiated franchising agreement. Nonetheless, the *in banc* court -- in its rush to avoid addressing the constitutionality of Sections 10(a) and 10(c) -- failed to reconcile the complete displacement of all contrary state laws and franchising agreements with its finding of no state action.[5] In fact, the decision below *cannot* be reconciled with *Hanson*, and so certiorari should be granted.

IV. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *SKINNER* v. *RLEA* WHICH HOLDS THAT STATE ACTION IS PRESENT WHEN THE GOVERNMENT EXPRESSES ITS STRONG PREFERENCE FOR AND THUS ENCOURAGES THE UNDERLYING PRIVATE CONDUCT.

Even assuming that the *in banc* court were correct in focusing solely on whether cable operators would be state actors when they censored programming in the manner contemplated by Section 10, the decision of the *in banc* court is flatly inconsistent with the well-established body of law which holds that the government must be held accountable for actions taken by private parties where it "has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum* v.

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[5]Indeed, by completely ignoring the preemption issue, the *in banc* court declined to square its no-state-action holding with its own contrary precedents. See, *e.g.*, *Franz* v. *United States*, 707 F.2d 582, 593 (D.C. Cir. 1983) (relying on *Hanson*, court ruled that state action was inherent in contract entered into pursuant to Federal Witness Protection Program because it allowed a private party to "modify or vitiate" otherwise applicable state family laws); *Kolinske* v *Lubbers*, 712 F.2d 471, 476 (D.C. Cir. 1983) ("In *Hanson* it was the preemption of a contrary state law by federal law that was central to the Court's finding of state action . . . .").

Yaretsky, 457 U.S. 991, 1004 (1982); *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840 (1982). While this Court has rejected state action arguments where the State merely "acquiesce[d] in" the challenged conduct, *Blum*, 457 U.S. at 1004-05, it has found sufficient encouragement where the State adopted more than just a "passive position" toward the challenged conduct. Specifically, in *Skinner* v. *RLEA*, 489 U.S. 602, 615 (1989), this Court found governmental action where the State's "strong preference" for non-mandatory drug testing by private railroads was apparent in the regulatory scheme.

The 1992 Act -- like the drug-testing regulations at issue in *Skinner* -- reflects Congress's strong preference for the prohibition of "indecent" programming and its desire to ensure the absence of any such programming on access channels. This scheme is, in short, a far cry from the mere acquiescence evidenced in *Blum*, the decision principally relied upon by the *in banc* court as support for its finding of no significant encouragement.

In particular, Section 10(d) -- which revokes the operators' statutory immunity for speech of third parties that "involves obscene material" -- evidences Congress's desire for a complete ban of anything questionable. Section 10's principal author stated when introducing the liability provision that its purpose was to "put an end to the kind of things going on" on access channels.[6] Indeed, as this court observed in *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 530 (1959), if the law made a media owner liable for the speech of an unaffiliated person, but in turn allowed the media owner to avoid liability by censoring that speech, "all remarks even faintly objectionable would be excluded out of an excess of caution."

The administrative record before the FCC confirms that Congress can expect to achieve its desired effect. The cable

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[6]138 Cong. Rec. S652 (daily ed. Jan. 30, 1992); see also *id.* at S646 ("amendment at the desk will *forbid* cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels.") (emphasis added).

operators repeatedly attested that Section 10(d) will force them to "*ban all questionable programming altogether.*"[7] This record evidence has been reiterated in the cable operators' separate lawsuit challenging the constitutionality of subsection (d), where, as recently as June of 1995, Time Warner flatly declared that subsection (d) will require cable operators to "refuse to carry speech that may in fact be constitutionally protected" -- *e.g.*, indecent cable speech.[8]

Even the FCC has recognized how Section 10(d) inevitably will affect programming decisions by cable operators. In both its First and Second Orders, the FCC freely acknowledges the critical role that subsection (d) will play in the decisionmaking process of the operators under subsections (a) and (c). App. 155a-56a, 192a. Further, as the FCC conceded in defending the constitutionality of subsection (d), the structure of the 1992 Act allows a cable operator to avoid liability for the content of access programming by simply exercising its newly created rights under subsections (a) and (c) to censor "*any* programming that it *reasonably believes* could *potentially* be considered obscene."[9]

Further proof that the government is not here merely "acquiescing" in the initiatives of the private cable operators is evidenced by the government's role in providing the "rule of decision" pursuant to which the cable operator acts. See *West* v. *Atkins*, 487 U.S. 42, 52 n.10 (1988) ("private party's challenged decisions could satisfy the state-action requirement if they were made on the basis of some rule of decision for which the State is responsible"). That is, the federal

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[7]See, *e.g.*, J.A. 222 ("practical result of Section 10 will be that cable systems will establish policies *which ban all 'questionable' programming altogether*, applying the policy broadly in order to avoid liability") (emphasis added).

[8]Reply Brief of Time Warner, Inc. in *Time Warner* v. *FCC*, Nos. 93-5349 (and consolidated cases) (D.C. Cir., filed June 26, 1995), at p. 44.

[9]United States' Opposition Memorandum in Support of Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment on Plaintiffs' Claims Other Than "Must Carry," *Time Warner* v. *FCC*, Nos. 92-2494 (and consolidated cases), at pp. 21-22 (D.D.C., filed Feb. 22, 1993) (emphasis added).

government defines the single category of cable programming that private operators are authorized to ban: indecent programming.[10] The federal government then requires that access programmers identify for the cable operators any programming which contains indecent material. See *supra* pp. 8-9. And finally, as the *in banc* court freely acknowledges, the FCC "resolve[s] any conflicts between a programmer and an operator on" the issue of what constitutes "indecent" material. App. 43a.[11] In short, the government has defined that material which may be banned, demanded that all such material which meets this definition be identified for the operator's benefit, and indicated its willingness to arbitrate any disputes about this definition. This is far more than a "passive position" on the government's part. See *Skinner*, 489 U.S. at 615.

Despite the fact that *Skinner* was fully briefed to the *in banc* court, the court cited *Skinner* only once for an entirely inapt proposition of law. App. 12a. The *in banc* court thus never grappled with the obvious parallels between the 1992 Act's regulatory scheme and the drug-testing scheme at issue in *Skinner*. As outlined above, however, the *Skinner* holding simply cannot be squared with the *in banc* court's decision --

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[10]In a separate petition for a writ of certiorari, No. 95-124 (filed July 21, 1995), DAETC and ACLU have argued that the writ should be granted to consider, *inter alia*, the important federal question of whether Section 10 is unconstitutionally vague. Petitioners herein agree with this argument and others made in this separate petition.

[11]As Judge Wald points out in her dissent, the statutory and regulatory scheme of the 1992 Act itself also operates to place significant "technical, administrative, and financial burdens on cable operators" pursuant to § 10(b)'s blocking scheme. App. 53a. Specifically, many cable operators, in the administrative record, have opined that "they view the § 10(b) segregation-and-blocking arrangement to be so technically and administratively cumbersome as to render it highly unattractive and indeed for many 'unworkable.'" App. 51a. Further, the issue of who will bear the costs of blocking remains open. As a result, until the FCC decides whether such costs can be shifted, "any operator undertaking segregation-and-blocking under § 10(b) bears the expense without any promise of recoupment." App. 52a-53a. There currently exists, then, a strong incentive to ban pursuant to § 10(a) rather than block.

indeed, it shows the government's "strong preference" that indecent programming be banned from access channels.

V. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS BY THIS COURT AND BY A STATE HIGH COURT REGARDING THE PUBLIC FORUM DOCTRINE AND THE NATURE OF THE CABLE MEDIUM.

Any attempt by the government to modify the character of a public forum is subject to First Amendment scrutiny. See *United States* v. *Grace*, 461 U.S. 171, 180 (1983). The *in banc* court avoided applying such scrutiny by holding that access channels do not constitute a public forum. This holding is based on two erroneous premises: (1) that access channels are purely private property; and (2) that private property can *never* be a public forum. App. 29a-31a. As a result, the *in banc* court's holding is inconsistent with this Court's precedents concerning the public forum doctrine, see *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), and the nature of cable television, *Turner*, 114 S. Ct. at 2451-52, and with the FCC's prior characterization of public access channels as a public forum. See *infra* p. 24 n.13. The *in banc* court's holding also conflicts with a recent decision of the high court of North Dakota, *City of Jamestown* v. *Beneda*, 477 N.W.2d 830 (N.D. 1991), regarding the public forum doctrine.

First, to suggest, as the *in banc* court does, that access channels "belong to private cable operators," App. 29a, is to fundamentally misunderstand the nature of these channels. Since as early as the 1960s, local governmental authorities have required cable operators to provide the public with the right to use public access channels as a condition of the franchising agreement. See *supra* pp. 4-5. That franchising agreement, in turn, provides the cable operator with "use of public rights-of-way and easements," upon which the cable system "depend[s] for its very existence," *Turner*, 114 S. Ct. at 2452, to lay or string the cable throughout a community. Thus, the entire cable system -- including access channels -- depends on its short-term disruption of and long-term occupation of valuable public rights-of-way.

Second, in any event, this Court made clear in *Cornelius* that even property that is nominally characterized as private may be a public forum if the government has "dedicated" it "to public use." 473 U.S. at 801.[12] There is no question that access channels have been dedicated to public use. Both the federal government and municipal authorities have dedicated access channels for the purpose of permitting the public to communicate via the cable medium. For this very reason, the FCC, as well as Congress, the courts, and commentators, all have concluded that access channels are a public forum.[13]

Nevertheless, the *in banc* court insists that "*Cornelius* cannot serve as a basis" for finding a public forum because "the dedication-of-private-property-to-public-use notion . . . [is] untenable." App. 30a-31a. In support of this conclusion, the *in banc* court relies on two inapt cases, *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), and *Hudgens* v. *NLRB*, 424 U.S. 507 (1976), in which there is no suggestion that the government had dedicated the private property for public use.

In *Beneda*, the North Dakota Supreme Court confronted a situation in which property had both public and private characteristics. The property at issue in *Beneda* consisted of walkways in a shopping center built on land owned by a municipality. However, the municipality had assigned its entire interest to a private developer. The *Beneda* court nonetheless

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[12]See also Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1759 (1987) (concluding that this Court does not "view the technicalities of property ownership as determinative" of whether a public forum exists).

[13]See, *e.g.*, 87 F.C.C.2d 40, 42 (1981) (because "the programmer has a right of access by virtue of local, state or federal law," access "channel[s are] set aside as a public forum"); H.R. Rep. No. 934, *supra*, at 30 ("Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet."); *Missouri Knights of Ku Klux Klan* v. *Kansas City, Mo.*, 723 F. Supp. 1347 (W.D. Mo. 1989); Brenner, *Cable Television*, *supra*, § 6.04[5], at 6-45 (an access channel is "a channel established by the government for the expressive activities of the public," and therefore is "by definition a 'public forum.'").

held that the property constituted a public forum. 477 N.W.2d at 832, 838.

In sum, this Court should grant certiorari to resolve the critical question of whether access channels historically dedicated for the public's exclusive use for expressive discourse as a condition of allowing cable operators to use public rights-of-way are a public forum.

VI. THE DECISION BELOW IS SQUARELY IN CONFLICT WITH THE SUPREME COURT'S HOLDING IN *SABLE COMMUNICATIONS, INC.* V. *FCC* THAT CONGRESS MUST CONSIDER THE EFFECTIVENESS OF EXISTING REGULATORY SCHEMES BEFORE REPLACING THEM WITH MORE RESTRICTIVE CONTENT-BASED SCHEMES.

Unlike its analysis of Sections 10(a) and 10(c), the *in banc* court did reach the constitutionality of Section 10(b), which requires cable operators that decline to ban all indecent leased access programming to place such programming on a channel that is blocked until up to 30 days after the subscriber requests in writing that the channel be unblocked. See 47 U.S.C. § 532(j), Stat. App. 4a-5a; 47 C.F.R. § 76.701(c), App. 171a. The court concluded that Section 10(b) provides the least restrictive means to further the state's compelling interest in protecting children from indecent programming, and therefore did not violate the First Amendment. App. 34a-39a.

That portion of the *in banc* court's decision flatly contradicts *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989), which also considered a First Amendment challenge to a content-based restriction on speech passed by Congress to protect children from indecency. In *Sable*, this Court struck down the statute because Congress had failed to consider whether existing, less restrictive FCC regulations addressing the same matter already protected children effectively. Thus, "the congressional record presented . . . no evidence" that the existing regulations were ineffective. *Id.* at 130. "No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors

could or would circumvent" the existing regulations. *Id.* Under those circumstances, the Court held, the more restrictive statute at issue was "not a narrowly tailored effort" to serve the state's interest in preventing minors from being exposed to indecent speech. *Id.* at 131.

Here, as in *Sable*, Congress created an entirely new content-based scheme for regulating indecency without ever considering whether the existing statutory mechanism was ineffective. As described previously, see *supra* p. 6, in the 1984 Act Congress specified that "lockboxes" must be made available to subscribers "to restrict the viewing of programming which is obscene or indecent." 47 U.S.C. § 544(d)(2), Stat. App. 5a. Congress praised the lockbox as "one means to effectively restrict the availability of such programming, particularly with respect to child viewers, without infringing the First Amendment rights of the cable operator, the cable programmer, or other cable viewers." H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984). The FCC has similarly embraced the effectiveness of lockboxes. See, *e.g.*, MM Dkt. No. 84-1296, 50 Fed. Reg. 18637, 18655 (May 2, 1985); MM Dkt. No. 89-494, 5 FCC Rcd 5297, 5305 (1990). And the *in banc* court itself concedes that lockboxes work -- indeed, it notes that "Judge Wald [in dissent] apparently agrees [with the majority] that lockboxes are effective means of restricting access to indecent programming." App. 38a n.22.

Despite this unanimous recognition of the effectiveness of lockboxes, Congress enacted Section 10(b)'s blocking scheme without even mentioning the subject, let alone suddenly reversing itself and finding lockboxes ineffective. In implementing Section 10(b), the FCC too failed to adduce any evidence whatsoever that lockboxes somehow had become ineffective.[14]

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[14]Faced with this lack of record evidence, the FCC simply relied on findings about *telephone* blocking mechanisms. For a myriad of reasons, conclusions about the effectiveness of technology in one medium -- such as telephonic communication -- have no application to a different medium, such as cable television. See, *e.g.*, *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978) ("[E]ach medium of expression presents special First Amendment problems.").

Moreover, the 1984 Act's lockbox requirement is far less restrictive than Section 10(b)'s content-based blocking scheme. First, the lockbox does not permit the government to favor or disfavor any type of speech and thus is entirely content-neutral. Indeed, a lockbox enables parents to block whatever type of programming they deem unsuitable for their children, be it indecency, or anything else. In contrast, the operator-initiated blocking method prescribed by Section 10(b) applies only to indecent programming, which makes it a content-based restriction and subject to "the most exacting scrutiny." *Turner*, 114 S. Ct. at 2459. Second, Section 10(b) forces the subscriber to choose between receiving all or none of the programming on the blocked channel, rather than permitting the subscriber to tailor what programming is available. Third, under Section 10(b)'s implementing regulations, a subscriber who wishes to view a certain program appearing on a blocked channel may have to wait up to thirty days for unblocking to occur -- which may be long after the program in question has appeared. 47 C.F.R. § 76.701(c), App. 171a.

Courts have the "obligation to exercise independent judgment when First Amendment rights are implicated" in order to "assure that, in formulating its judgments, Congress has drawn *reasonable inferences based on substantial evidence*." *Turner*, 114 S. Ct. at 2471 (plurality opinion) (emphasis added). Here, Congress and the FCC have articulated no reason and pointed to no evidence that warrants supplementing the content-neutral lockbox requirement with the content-based restrictions of Section 10(b). Despite these glaring omissions from the legislative and regulatory records, the *in banc* court sustained Section 10(b)'s blocking requirements as the least restrictive means. That judgment is wholly at odds with *Sable*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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STATUTORY APPENDIX

The following are relevant statutory provisions relating to PEG or public access cable channels from the Cable Communications Policy Act of 1984 ("the 1984 Act"), and Section 10(c) of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act"), as they appear in the U.S. Code:

47 U.S.C. § 531 (1988).

Cable channels for public, educational, or governmental use

(a) Authority to establish requirements with respect to designation or use of channel capacity

A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

(b) Authority to require designation for public, educational, or governmental use

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

. . . .

(e) Editorial control by cable operator

Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section.

. . . .

[§ 611 of the Communications Act of 1934, as added by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2782.]

[Note to 47 U.S.C. § 531 (Supp. V 1993)]

REGULATIONS

Pub. L. 102-385, § 10(c), Oct. 5, 1992, 106 Stat. 1486, 1503, provided that: "Within 180 days following the date of the enactment of this Act [Oct. 5, 1992], the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."

* * * *

The following are relevant statutory provisions relating to leased access cable channels from the 1984 Act and Sections 10(a) and 10(b) of the 1992 Act, as they appear in the U.S. Code:

47 U.S.C. § 532 (1988 & Supp. V 1993).

Cable channels for commercial use

(a) Purpose

The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.

(b) Designation of channel capacity for commercial use

(1) A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements:

(A) An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

(B) An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

(C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.

(D) An operator of any cable system with fewer than 36 activated channels shall not be required to designate channel capacity for commercial use by persons unaffiliated with the operator, unless the cable system is required to provide such channel capacity under the terms of a franchise in effect on October 30, 1984.

(E) An operator of any cable system in operation on October 30, 1984, shall not be required to remove any service actually being provided on July 1, 1984, in order to comply with this section, but shall make channel capacity available for commercial use as such capacity becomes available until such time as the cable operator is in full compliance with this section.

. . . .

(5) For the purposes of this section, the term "commercial use" means the provision of video programming, whether or not for profit.

. . . .

(c) Use of channel capacity by unaffiliated persons; editorial control; restriction on service; rules on rates, terms, and conditions

(1) If a person unaffiliated with the cable operator seeks to use channel capacity designated pursuant to subsection (b) of this section for commercial use, the cable operator shall establish, consistent with the purpose of this section and with rules prescribed by the Commission under paragraph (4), the price, terms, and conditions of such use which are at least

sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.

(2) A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

. . . .

(h) Cable service unprotected by Constitution

Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority or the cable operator is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States. This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

. . . .

(j) Single channel access to indecent programming

(1) Within 120 days following October 5, 1992, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) of this section by --

(A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;

(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).

[§ 612 of the Communications Act of 1934, as added by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2782, and as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 9, 10(a), (b), 106 Stat. 1484, 1486.]

• • • •

The following are other relevant provisions from the 1984 Act and Section 10(d) of the 1992 Act as they appear in the U.S. Code:

47 U.S.C. § 544 (1988 & Supp. V 1993), as amended, 47 U.S.C.A. § 544(d)(2) (West Supp. 1995).

Regulation of services, facilities, and equipment

. . . .

(d) Cable service unprotected by Constitution; blockage of premium channel upon request

(1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

(2) In order to restrict the viewing of of [*sic*] programming which is obscene or indecent upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

. . . .

[§ 624(d) of the Communications Act of 1934, as added by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2789-90, and as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 15, 106 Stat. 1490) (changing caption and adding subsection (3), not quoted here), and by the Communications Assistance of Law Enforcement Act, Pub. L. No. 103-414, §§ 303(a)(23), 304(a)(12), 108 Stat. 4295, 4297 (Oct. 25, 1994).]

47 U.S.C. § 558 (Supp. V 1993).

Criminal and civil liability

Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements unless the program involves obscene material.

[§ 638 of the Communications Act of 1934, as added by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2801, and as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(d), 106 Stat. 1486 (inserting "unless the program involves obscene material" at the end of the section).]